Supreme Court, U. S.
FILED
DEC 7 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 1979

No. 79-243

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, and KEVIN McCARTHY,
Appellants,

v.

COMMONWEALTH OF VIRGINIA,
Appellee.

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, and KEVIN McCARTHY,
Appellants,

v.

RICHARD H.C. TAYLOR,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF VIRGINIA

BRIEF AMICI CURIAE IN SUPPORT OF APPELLANTS

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
THE ASSOCIATED PRESS MANAGING EDITORS
THE NATIONAL ASSOCIATION OF BROADCASTERS
THE NATIONAL NEWSPAPER ASSOCIATION
THE NATIONAL PRESS CLUB
THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION
THE SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI
THE VIRGINIA PRESS ASSOCIATION

Of Counsel:

Jack C. Landau
Peter C. Lovenheim
The Reporters Committee
for Freedom of the Press
1125 15th Street, N.W.
Washington, D.C. 20005

E. BARRETT PRETTYMAN, JR.
Hogan & Hartson
815 Connecticut Avenue, N.W.
Washington, D.C. 20006

Attorney for Amici Curiae

[List of attorneys continued on inside cover]

CASILLAS PRESS, INC.—1717 K Street, N.W.—Washington, D.C.—223-1220

Of Counsel:

Erwin G. Krasnow
1771 N Street, N.W.
Washington, D.C.
The National Association of Broadcasters

Arthur B. Sackler
Suite 400
1627 K Street, N.W.
Washington, D.C. 20006
The National Newspaper Association

J. Laurent Scharff
Pierson, Ball & Dowd
1200 18th Street, N.W.
Washington, D.C. 20036
The Radio-Television News Directors Association
1735 DeSales Street, N.W.
Washington, D.C. 20036

Leon Ely
Suite 118
Wards Building
Richmond, Virginia 23227
The Virginia Press Association

Other Interested Parties:

Frank Johnson, Managing Editor
(Tuscon) Arizona Daily Star

Michael Davies, Editor
Kansas City Star

for

The Associated Press
Managing Editors
50 Rockefeller Plaza
New York, New York 10020

Vivian Vahlberg
The Daily Oklahoman

for

The National Press Club
National Press Building
Washington, D.C. 20045

Robert Lewis
Newhouse News Service

for

The Society of Professional Journalists, Sigma Delta Chi
35 E. Wacker Drive
Chicago, Illinois 60601

INDEX

Page

STATEMENT OF INTEREST 1

ARGUMENT

I. Gannett Should Be Re-Examined 4

II. The Gannett Rationale Has Basic Flaws 8

III. There Are Alternatives to Closure 14

IV. There Must Be Notice, A Meaningful Hearing, and A Chance To Appeal 15

V. Only Open Proceedings Will Reveal the Entire Judicial Process As It Actually Operates and Assure Accurate News Reports to the Public 18

Table of Citations

Carroll v. *President and Commissioners of Princess Anne,*
393 U.S. 175 (1968) 13, 15

CBS, Inc. v. *Young,*
522 F.2d 234 (6th Cir. 1975) 20

Chicago Council of Lawyers v. *Bauer,*
522 F.2d 242 (7th Cir. 1975), *cert. denied sub nom. Cunningham* v. *Chicago Council of Lawyers,* 427 U.S. 912 (1976) 20

Cox Broadcasting Corp. v. *Cohn,*
420 U.S. 469 11

Duren v. *Missouri,*
47 U.S.L.W. 4089 (U.S. January 9, 1979) 9

Page

Florida v. *Zamora*,
Circuit Court, Eleventh Judicial Circuit of Florida, Criminal Division, Case No. 77-25123-A at 15-16 19

Freedman v. *Maryland*,
380 U.S. 51 (1965) 15

Gannett Co. v. *DePasquale*,
47 U.S.L.W. 4902 (July 2, 1979) ..... *passim*

Holt v. *United States*,
218 U.S. 245 (1910) 14

In Re Halkin,
598 F.2d 176 (D.C. Cir. 1979) 20

Irvin v. *Dowd*,
366 U.S. 717 (1961) 14

Joint Anti-Fascist Refugee Comm. v. *McGrath*,
341 U.S. 123 (1951) 22

Lutwak v. *United States*,
344 U.S. 604 (1953) 14

Malinski v. *New York*,
324 U.S. 401 (1945) 12

Murphy v. *Florida*,
412 U.S. 794 (1975) 14

Nebraska Press Ass'n v. *Stuart*,
427 U.S. 539 (1976) 14, 15, 20

Oklahoma Pub. Co. v. *District Court*,
430 U.S. 308 (1977) (*per curiam*) 20

Organization for a Better Austin v. *Keefe*,
402 U.S. 415 (1971) 13

Page

People v. *Jones*,
47 N.Y.2d 409, 391 N.E.2d 1335 (N.Y. Ct. App.), *cert denied*, 48 U.S.L.W. 3309 U.S. (November 5, 1979) 12

Police Department of Chicago v. *Mosley*,
408 U.S. 92 (1972) 13

Rex v. *Justices of Bodmin*
[1974] 1 K.B. 321 (1946) 22

Rochin v. *California*,
342 U.S. 165 (1952) 12

Smith v. *Organization of Foster Families*,
431 U.S. 816 (1977) 15

Southeastern Promotions, Ltd. v. *Conrad*,
420 U.S. 546 (1974) 13

State ex rel. Dayton Newspapers, Inc. v. *Phillips*,
46 Ohio St.2d 457, 351 N.E.2d 127 (1976) 19, 22

Strauder v. *West Virginia*,
100 U.S. 303 (1880) 9

Taylor v. *Louisiana*,
419 U.S. 522 (1975) 9

United States v. *Powers*,
S.D. Iowa, Crim. No. 79-26 (September 7, 1979) 17

Westchester Rockland Newspapers, Inc. v. *Leggett*,
No. 484, November 20, 1979, slip opinion at 1-2 ..... 11, 14

Constitutional Provisions:

FIRST AMENDMENT ..... *passim*

SIXTH AMENDMENT ..... *passim*

NINTH AMENDMENT 11

FOURTEENTH AMENDMENT 9

Miscellaneous: Page

A. Cox, M. Howe, & J.R. Wiggins, *Civil Rights, The Constitution and the Courts,* 70-71 (1967) 15

Emerson, *The Doctrine of Prior Restraint,* 20 Law and Contemp. Prob. 648 (1955) 22

Fenner and Koley "The Rights of the Press and the Closed Court Criminal Proceeding," 57 Neb. L. Rev. 442 (1978) 13, 19, 22

Goodale, "Gannett: Loopholes May Send Case Way of Court's Other Aberrations," The Nat. Law. J. (August 13, 1979) 5

Goodale, "Gannett Means What It Says; But Who Knows What It Says?," The Nat. Law. J. (October 15, 1979) 5

Kamisar, "Another View of Gannett: Power Opinion Is Pivotal," The Nat. Law. J. (October 15, 1979) 5

McKay, *The Preference For Freedom,* 34 N.Y.U.L. Rev. 1182 (1959) 15

Prettyman, "Building Walls With Gannett," 4 District Lawyer No. 2, p. 37 (October/November 1979) 5

Report To the Supreme Court of Florida Re: Conduct of Audio-Visual Trial Coverage (undated) 19

Stevens, J., Address, The University of Arizona College of Law Dedication Ceremony, September 8, 1979 8

Strobel, "Has Supreme Court Closed Down on Press?," Chicago Tribune (July 8, 1979) 5

Zion, "High Court vs. The Press," The New York Times Magazine, p. 76 (November 18, 1979) 5

5 Med. L. Rep. No. 24 (November 20, 1979) 6

IN THE

Supreme Court of the United States

October Term 1979

No. 79-243

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, and KEVIN McCARTHY, *Appellants,*

v.

COMMONWEALTH OF VIRGINIA, *Appellee.*

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, and KEVIN McCARTHY, *Appellants,*

v.

RICHARD H.C. TAYLOR, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF VIRGINIA

BRIEF AMICI CURIAE IN SUPPORT OF APPELLANTS

Amici curiae are seven national press organizations and one state press association. They support Appellants in seeking reversal of the judgment below.

STATEMENT OF INTEREST

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and news editors from the print and broadcast media devoted to the protection of the First Amendment and freedom of information interests of the press. As this Court knows, this Amicus has appeared in virtually every recent case before the Court involving restrictions on the ability of the press to report judicial proceedings.

The Associated Press Managing Editors is an organization of 600 editors of newspapers affiliated with the Associated Press, which is the largest news-gathering organization in the world and is cooperatively owned by its member newspapers. It is extremely interested in First Amendment problems and has been active in many ways to further the news-gathering interest of the press.

The National Association of Broadcasters (NAB) is a non-profit incorporated association of radio and television broadcast stations and networks. As of September 1, 1979, NAB's membership included 2587 AM radio stations, 2030 FM radio stations, 583 television stations, and all nationwide commercial broadcast networks. The object of NAB, according to its Bylaws:

> [S]hall be to foster and promote the development of the arts of aural and visual broadcasting in all its forms; to protect its members in every lawful and proper manner from injustices and unjust exactions; to do all things necessary and proper to encourage and promote customs and practices which will strengthen and maintain the broadcasting industry to the end that it may best serve the public.

Among NAB's primary concerns is maintaining the vitality of the First Amendment guarantee of freedom of the press.

The National Newspaper Association is a national organization of 5,500 newspapers with members in all 50 states. Its purpose is to preserve the constitutional guarantee of freedom of the press.

The National Press Club, the largest press club in the United States, is a broadly based journalistic organization. More than 1,200 active journalists, in all regions of the country, are members of the National Press Club.

The Radio-Television News Directors Association (RTNDA) is a non-profit professional organization of journalists. It includes approximately 1,500 members who are active in the supervision, gathering, reporting and editing of news and other information of public affairs broadcast by the national networks and by local radio and television stations throughout the nation.

The Society of Professional Journalists, Sigma Delta Chi, is a voluntary, not-for-profit organization, of nearly 35,000 members representing every branch of print and broadcast journalism. It includes all ranks from student and beginning reporter to editor, publisher and broadcast executive. The Society works to preserve the public's right to know, to require that the public's business be conducted in public and to keep governmental records open to public inspection.

The Virginia Press Association is a non-profit corporation registered in the Commonwealth of Virginia representing a majority of the daily and weekly newspapers published in Virginia. The purpose of the Association is to expedite programs and activities furthering the editorial excellence of these newspapers and their service to the citizens of Virginia.

ARGUMENT

I. Gannett Should be Re-Examined

The Court has before it a case in which an entire criminal trial was closed to the press and the public. For all of the reasons stated by the Chief Justice in his concurring opinion in *Gannett Co.* v. *DePasquale,* 47 U.S.L.W. 4902 (July 2, 1979), by the four dissenting Justices in that case (*id.* at 4912), and in the briefs filed by Appellants and the other amici supporting them in the instant case, we respectfully urge the Court to rule explicitly that absent proof of a direct, immediate and irreparable injury to the administration of justice, criminal trials must remain open to the press and the public.

We do more, however, than merely add to the many voices pointing out all of the reasons why justice is best served by having criminal trials open to public inspection. We believe this is an appropriate case for the Court to address itself not only to criminal trials but to *all* judicial proceedings in a criminal case — pre-indictment, pretrial, trial, and post-trial alike. We submit, in other words, that the Court should re-evaluate *Gannett* and overturn the decision as it relates to pretrial hearings and to trials such as the one at issue in this case.

This is appropriate for several reasons:

1. Those joining in Mr. Justice Stewart's opinion in *Gannett* spoke in terms of criminal trials as much as they did in terms of pretrial hearings. In order to decide the instant case, they must, *perforce,* re-examine much of what they said by way of *dictum* in *Gannett.* As spelled out below, we believe that the reasoning applied

in *Gannett* both to criminal trials and to pretrial hearings will not withstand critical analysis and that therefore the press and public should be found to have a vested constitutional right to attend all types of judicial proceedings in a criminal case.

2. Great confusion has arisen among lower courts, the bar, the media and the public as to what *Gannett* means, and the case is being used as grounds for closing all types of criminal proceedings. Commentators[1] as well as members of the Court itself have made statements about what the case held, and these statements have not always been consistent one with the other. Whether the confusion has arisen, as some members of this Court have suggested, because of faulty reporting in the press, or, as a number of commentators have maintained, because of ambiguities and contradictions within the opinions themselves is no longer relevant. What is relevant — and what must be candidly addressed — is that for whatever reason, lower courts do not understand what *Gannett* holds, and as a result, a wide variety of actions are being taken for a wide variety of reasons, all ostensibly based upon *Gannett* but few of which bear any reasonable resemblance to what *Gannett* could possibly have sanctioned. A re-examination of that case, therefore, is peculiarly in order.

---

[1] *E.g.,* Goodale, "Gannett: Loopholes May Send Case Way of Court's Other Aberrations," the Nat. Law J. (August 13, 1979); Goodale, "Gannett Means What It Says; But Who Knows What It Says?," The Nat. Law J. (October 15, 1979); Kamisar, "Another View of Gannett: Power Opinion Is Pivotal," The Nat. Law J. p. 14 (November 19, 1979); Prettyman, "Building Walls With Gannett," 4 District Lawyer No. 2, p. 37 (October/November 1979); Strobel, "Has Supreme Court Closed Down on Press?," Chicago Tribune (July 8, 1979); Zion, "High Court vs. The Press," The New York Times Magazine, p. 76 (November 18, 1979).

At the time the Amici filed their brief supporting the Jurisdictional Statement in this case, they were able to cite some 51 post-*Gannett* decisions relating to the attempted closure of courtrooms. That number has now grown to 109.[2] Of these, closures have been initially enforced or upheld on appeal in 61 cases, and refused or withdrawn in 43. The criminal proceedings sought to be closed include 11 pre-indictment proceedings, 74 pretrial proceedings, 20 trials, and four post-trial hearings. See 5 Med. L. Rep. No. 24 (November 20, 1979).

Among these have been instances in which:

– pretrial proceedings have been closed and transcripts sealed even though the prosecutors have taken no position on the issues before them.

– proceedings have been closed and records sealed even in the face of prosecutorial objection.

– the media, despite timely motions, have been denied all standing, as well as the right to intervene and present evidence.

– one or more co-defendants have made closure motions, while other co-defendants have either opposed the motions or remained silent.

– closure motions have been based upon possible publicity not in the pending cases but in unrelated cases.

– an entire probable cause hearing has been closed

[2]It is safe to assume that even this figure would be vastly greater but for the public statements during the summer and fall by various Justices warning that *Gannett* was being misinterpreted. These statements undoubtedly had a restraining effect upon many judges who otherwise might have been tempted to read the widest possible interpretation into the *Gannett* opinions.

Amici have lodged with the Clerk of the Court a summary of these cases, with accompanying citations.

because of possible personal embarrassment to the defendant.

– four proceedings have been closed to the press even though members of the public have been allowed to attend.

– a case has been dismissed because the defendants were thought to have been deprived of their "right" to a closed preliminary hearing.

– a United States Attorney has moved to seal proceedings over the objection of the accused.

– a motion to seal *pretrial* proceedings has resulted in an order sealing all proceedings until a verdict or other final disposition of the case.

– a witness has moved to close part of a trial because of possible prejudice to that witness in another trial on a related charge.

– a pretrial proceeding, parts of a trial and an entire trial have been closed because of possible embarrassment to rape victims.

– proceedings have been closed and records sealed merely upon motion of defendants and without any showing of prejudice, even in a murder case.

– attempts to close proceedings have been accompanied by direct prior restraints on the press in at least three instances.

– a hearing on whether a pretrial proceeding should be closed has itself been closed to the press and the public.

It seems obvious even from these few examples that regardless of what the Court intended, *Gannett* needs, at

the very least, clarification and redefinition before lower courts use it as a vehicle for changing the basic structure of this country's judicial system.[3] As noted above, however, we would earnestly hope that the instant case would become more than an opportunity to restate, in more direct and simplified terms, the precise holding in *Gannett* as to pretrial hearings. We would urge the Court to reconsider the underlying rationale of that case, to reverse its ruling outright as to such hearings, and to hold that pretrial as well as trial proceedings must remain open.

II. The Gannett Rationale Has Basic Flaws.

We respectfully submit that there were two basic flaws in the majority's approach to *Gannett:*

(a) While the Court purported to reject the concept that a defendant has a Sixth Amendment right to a "private trial," it failed to give a specific mandate to prosecutors and judges other than to protect a non-defined "societal interest," and as a result, proceedings are being closed despite the non-concurrence of, or even in the face of opposition by, prosecutors. Courts are thus assuming that because an accused has a constitutional right to an *open* trial, he can, by the simple device of waiver or

[3]Mr. Justice Stevens has said in a recent address that the "rules concerning access to trial proceedings * * * are exactly the same today as they were in 1973 and 1974," and that there is "no reason to believe that any trial judge or any prosecutor would have acted any differently [prior to *Gannett*] than he did if he had foreseen Gannett * * *." Stevens J., Address, The University of Arizona College of Law Dedication Ceremony, September 8, 1979. We can only respond, with the greatest deference, that the list of cases in the text demonstrates that the Justice's statements do not appear to reflect the same perceptions as the judges and prosecutors on the firing line. Even the few examples cited above represent vast departures from the law as it was almost universally interpreted and applied prior to *Gannett*.

motion, convert that into a right to a *closed* trial, as if no other interests were at stake. The existence of the obverse right does not necessarily connote the existence of the reverse one, for the Constitution nowhere speaks in terms of a right to a closed trial.

To take a simple example: this Court has consistently held, beginning with *Strauder* v. *West Virginia,* 100 U.S. 303 (1880), that discrimination against jurors based on race is forbidden by the Fourteenth Amendment. It has more recently held that women cannot be excluded from juries, based on their sex. *Taylor* v. *Louisiana,* 419 U.S. 522 (1975); *Duren* v. *Missouri,* 47 U.S.L.W. 4089 (U.S. January 9, 1979).

Would this Court hold that the defendant below, by simply waiving his right to have his jury selected in a non-discriminatory manner, thereby allowed the trial judge affirmatively to exclude all blacks and women from the list of potential jurors? Would this Court tolerate a system of justice based on racial or sexual discrimination, simply at the behest of the defendant? Would this Court tell black or female residents of Hanover County that they have "no standing" to be part of the jury pool and to participate equally in the criminal justice system on the same basis as their neighbors, whatever the reason offered by the defendant?

We do not wish to belabor the point, but a logical extension of Mr. Justice Stewart's decision could lead to the most extreme and bizarre results. Would a judge stand mutely by if a defendant made no objection to testimony against him by a witness who had been tortured? For that matter, suppose a masochist defendant demanded to be tortured before he would willingly confess; would this Court sanction the torture and subse-

quent use of the confession on the theory that the defendant had waived his due process right to have a confession taken from him by peaceful means?

The simple answer to all these hypothetical situations is that there are some aspects of the criminal justice system which are so fundamental that they cannot be waived because the rights of others — particularly the public — are also involved.

The difficulty with the analysis in *Gannett* is that the criminal justice system is treated as some sort of private commercial contractual arrangement where rights can be asserted or waived only by parties at interest, and where there is no standing in the public and the press because they are not initially or formally parties to the proceedings. For all of the reasons asserted by the Appellants and the other amici, the press and the public have a paramount interest in observing the functioning of their courts.[4]

The fact that a defendant can force a proceeding to remain open should not by any extension of law or logic suggest that he has a comparable right to close it down, any more than his right to an impartial jury selected from a cross-section of the community gives him a right to exclude blacks or women. There are simply certain

[4]Perhaps these reasons were best summarized in the concurring opinion of Chief Justice Cooke of the New York Court of Appeals, the same court that originally decided *Gannett*. He said:

> * * * public proceedings protect the rights of the defendant by safeguarding against attempts to employ courts as instruments of persecution (see *People* v *Jones*, 47 NY2d 409, 413, cert den __ US __). And, in a larger sense, public scrutiny of all involved in the criminal justice system serves at once as a deterrent to partial justice and fosters a sense of confidence and respect on the part of the public in that system. In short, open judicial proceedings serve "to guarantee the fairness of

standards inherent in our criminal justice system which cannot be made to rest on the waiver of rights by defendants — with or without the concurrence of prosecutors and judges — because these parties are not the only members of the community with a vital interest in the operation of the criminal justice system.

(b) The Court also erred in *Gannett* in treating the open courtroom issue as solely one of *access*. We too would urge, for reasons stated by others, that there is both a First and Sixth Amendment right in the press and the public to be present at judicial proceedings. But whether or not one accepts these arguments, that should not end the matter.

All members of this Court in *Gannett* limited their comments to the presence or absence of a First or Sixth Amendment right of access by the press and public. It was as if the forum sought to be entered was a prison, a grand jury room, or an executive session of the Senate Foreign Relations Committee — forums which have traditionally, and usually for good cause, been closed.

But that is not the nature of what is being sought here. The press and public are not trying to force their way into places normally forbidden to them. Whether the open courtroom stems from the rights of a free people reserved to them through the Ninth Amendment, as

> trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice" (*Cox Broadcasting Corp.* v *Cohn*, 420 US 469, 492). [*Westchester Rockland Newspapers, Inc.* v. *Leggett*, No. 484, November 20, 1979, slip opinion at 1-2.]

Interestingly, in the *Leggett* case, New York's highest court drew back from any extension of the *Gannett* rationale and unanimously held, with one judge not participating, that even a pretrial mental competency hearing in a rape case had to remain open despite a claim of prejudice by the defendant.

argued by the American Newspaper Publisher Association and the American Society of Newspaper Editors, or whether it is an integral link in our common law heritage, or whether it is simply a part of a legal system that so benefits all our citizens that it cannot be waived by any one of them, the result is the same: courtrooms must remain open in all but the most extraordinary circumstances because only in that way can we guarantee justice and thus assure our continance as a free people.

The true analysis should not focus exclusively on a defendant's Sixth Amendment right versus a Sixth or First Amendment right on behalf of the public and press. Instead, it should recognize that "the concept of a secret trial is anathema to the social and political philosophy which motivates our society * * *." *People* v. *Jones,* 47 N.Y.2d 409, 413, 391 N.E.2d 1335, 1338 (N.Y. Ct. App.), *cert. denied,* 48 U.S.L.W. 3309 (U.S. November 5, 1979). As said in another context, there is imposed "upon this Court an exercise of judgment upon the whole course of the [criminal justice] proceedings * * * in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English speaking peoples * * * ." *Malinski* v. *New York,* 324 U.S. 401, 416 (1945). Secret probable cause hearings, secret pretrial proceedings, secret trials and secret post-conviction hearings, because of their extraordinary import, constitute nothing less than "conduct that shocks the conscience" because they are "calculated to discredit law and thereby to brutalize the temper of society." *Rochin* v. *California,* 342 U.S. 165, 172, 174 (1952).

As noted above, the justification for this result could rest on various analyses, so long as it focuses on the larger issues. Thus, a persuasive argument has been

made in one article (n.9, *infra*) that the closed judicial proceeding is nothing more or less than a prior restraint on the press, no matter which test or standard is used for determining whether a particular order constitutes a prior restraint. 57 Neb. L. Rev. at 460-475. The authors conclude, in fact, that the breadth of a closure order is "greater * * * than the gag order unanimously declared unconstitutional in *Nebraska Press Association.*" *Id.* at 464; see also 473. We will not repeat here the reasoning employed in their article, but will merely note that their position would appear to be unassailable from the standpoint of both logic and precedent.

Similarly, amici, in their brief supporting the granting of a hearing in this case, argued that a court closure is no different than the exclusion of the public from a public forum which the people have a vested right to attend. "Brief Amici Curiae in Support of Jurisdictional Statement" at 21-28. Again, we will not repeat here each of the arguments made there. Suffice it to say that, based on such cases as *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U.S. 546 (1974), *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415 (1971), *Carroll* v. *President and Commissioners of Princess Anne,* 393 U.S. 175 (1968), and *Police Department of Chicago* v. *Mosley,* 408 U.S. 92 (1972), it is clear that what goes on in a courtroom is a political expression on issues of the highest importance to the public and therefore entitled to the same protection accorded the public forum demonstrations, the picketing and the musical involved in those cases.

The significance of each of these arguments is that they do not depend upon finding some discrete, individual and identifiable constitutional right for each member of the press or public before a courtroom is

allowed to remain open. The courtroom remains open because society as a whole has a vital stake in making certain that justice is not administered in secret.

III. There Are Alternatives to Closure.

It is because of this larger context, this greater dimension, of the effect of closure that one must look for alternatives to closure.

> * * * [A]n open judicial proceeding is a necessary correlative to a free and open society. Thus, before any proceeding is closed, the proponent of the closure order must establish that there exist no other less restrictive protective measures available to assure a fair trial. In short, the right of the public to attend judicial proceedings ends only where the defendant's right to trial by an impartial jury is unalterably threatened. [Cooke, Ch.J., concurring, *Westchester Rockland Newspapers, Inc.* v. *Leggett, supra,* slip opinion at 3.]

Here, as in *Nebraska Press Ass'n* v. *Stuart,* 427 U.S. 539 (1976), there are alternative means of dealing with any potential prejudice to the accused. In the context of a trial, sequestration is always available, and if it is argued that sequestration is burdensome and costly and should be reserved for the extraordinary case, the answer is that in only such an extraordinary case can it possibly be said that publicity will, with any assurance, have some perceivable adverse effect on a jury.[5]

---

[5] *Irvin* v. *Dowd,* 366 U.S. 717, 722-723 (1961); *Murphy* v. *Florida,* 421 U.S. 794, 799-800 (1975); *Lutwak* v. *United States,* 344 U.S. 604, 619 (1953); *Holt* v. *United States,* 218 U.S. 245, 248 (1910).

As one judge has pointed out, "there is no problem at all in the great majority of the hundreds of thousands of criminal cases which are brought each year in this country because less than one percent of the cases are even given a line of notice in the press and of that one percent seventy-five to ninety percent plead guilty. So * * * what is involved is a small faction of the less than one percent of the criminal trials brought." See A. Cox, M. Howe, & J.R. Wiggins, *Civil Rights, The Constitution and the Courts,* 56, 70-71 (1967).

If the context is a pre-conviction or pretrial hearing, all of the less restrictive alternatives suggested by *Nebraska Press Ass'n* v. *Stuart, supra,* 427 U.S. at 562-565, and its predecessor cases are available: voir dire, change of venire, change of venue, continuance, instructions, mistrials, new trials and reversals. Certainly the burden is on one attempting to close a courtroom to show that all of these alternatives are ineffective, a burden which the defendant in the instant case did not attempt to meet.

The defendant here did not show that an open courtroom would result in a denial of his rights, or that closing the courtroom would protect his rights. Yet such showings are essential before closures can even be considered.

IV. There Must Be Notice, A Meaningful Hearing, and A Chance To Appeal.

This Court's cases make clear that even preliminary nonfinal decisions which merely *threaten* First Amendment rights must afford those so threatened with notice and an opportunity to be heard and to present evidence. *E.g., Carroll* v. *President and Commissioners of Princess Anne, supra; Smith* v. *Organization of Foster Families,* 431 U.S. 816 (1977); *Freedman* v. *Maryland,* 380 U.S. 51 (1965). See also McKay, *The Preference for Freedom,* 34 N.Y.U.L. Rev. 1182, 1219 (1959).

In this regard, both Mr. Justice Stewart's and Mr. Justice Powell's opinion in *Gannett* assumed that whatever First Amendment right was involved, it had been protected by the trial judge's actions in that case. But what actually occurred was that when the closure order was announced, no member of the press or public objected, the suppression hearing was held in private, and only after it had been completed and the press objected the following day was any kind of "hearing" held on the closure order.

As for the public, is it at all realistic to assume that any layman is going to stand up in a courtroom, before or after a judge's order is entered, and object to that order? Can the closing of our courtrooms really rest upon so slender a reed? And as for the press, it is quite true that reporters from our largest media can be forewarned, can even be furnished with cards that express an objection in legal language and a demand to be heard, so that when a closure motion is mentioned, they can rise and read their objections. But again, is it either fair or realistic to expect reporters from the small dailies, the weeklies, country radio stations and the like to be prepared in this fashion? And regardless of which type of media organization is represented, what is to be done when the closure motion is heard and ruled upon in private, either by design or because no member of the press happens to be present when the motion is made? The closing of courtrooms is made to depend, under these rulings, upon either sheer chance or the ingenuity of the lawyers seeking to close the courtrooms.[6]

[6]The Court will note from the above recitation of examples of what has occurred since *Gannett* that a number of courts have allowed the media (and presumably the public) no standing at all to object to closure orders or to present evidence rebutting the position of the accused. These courts seem to have reasoned that since, under *Gannett,* the media and the public have no First or Sixth Amendment rights at stake, only the accused and the prosecutor are parties to the closure hearing. A logical extension of this conclusion is that neither the press nor the public can appeal an adverse ruling, so that where a prosecutor fails to take a stand, there can be no appellate testing of the closure order. While we strongly believe, as argued elsewhere in this brief, that the rights of the press and the public are, at the very least, sufficiently threatened to accord standing and the right to appeal, we strongly urge the Court to make explicitly clear that no closure order can be entered until fair notice and an opportunity to be heard have been afforded representatives of the press and public, and that closure orders are instantly appealable by any representative of the press or public, regardless of whether that representative happens to be present when the order is entered.

The above assumes, of course, that a hearing, once properly invoked, will be a meaningful one. Experience has proven otherwise. What is actually happening is that defense attorneys are displaying to trial judges one or more news stories about their clients and claiming potential prejudicial publicity, prosecutors are taking no position at all or joining in the closure motions,[7] and trial judges are all too often citing *Gannett* and closing their courtrooms as if no other alternatives are open to

[7]The Court apparently failed to appreciate not only that many prosecutors would rather maintain a neutral position than take the chance of being reversed on appeal, but that supporting closure motions might actually run into conflict with prosecutorial trial positions. This latter point is illustrated by *United States* v. *Powers,* S.D. Iowa, Crim. No. 79-26 (September 7, 1979), in which the defendant moved to exclude the public on the theory that the people he would testify about as part of his defense were so violent that his own life and those of his family were in danger. The United States, of course, was taking the position that these persons were not violent, and therefore, as the court noted, "the defendant has shown that the prosecution would never consent to the closure because the issue before the Court focuses on a possible defense to the prosecution's charges against the defendant." Slip Opinion at 3.

them. This Court's admonition that courts and prosecutors must protect "the societal interest" is being largely ignored, in no small part because under the *Gannett* opinions it is not perceived what "the societal interest" is that must be protected.

We submit that the press and the public should not have to submit their rights to open courtrooms to the whims, caprices or motives of defendants and prosecutors. The right should stand unabused, absent the most extraordinary showing not only that closure is absolutely essential but that no other alternative is available. And closure should not depend on whether a member of the press or public happens to be on hand to assert the right.

V. Only Open Proceedings Will Reveal the Entire Judicial Process As It Actually Operates and Assure Accurate News Reports to the Public.

One does not have to be in favor of televising judicial proceedings in order to appreciate the force and cogency of a trial judge's remarks in a report to the Supreme Court of Florida following a trial which he had conducted and which was televised. He said in part:

> The judge's conduct in the course of a trial should not be screened from public scrutiny. This is especially true since the judicial branch of government is the only bulwark that stands as a shield between the people and the executive sword. The public has a right to know whether a judge is decisive or indecisive, attentive or inattentive, courteous or rude, whether or not he can maintain control over the trial proceedings and if he appears learned or confused. To this extent it makes little difference

> whether the judge is observed by spectators in the courtroom or by spectators viewing television.[8]

Later in his report (pp. 20-21), the judge expanded upon the same thesis: "The printed record standing alone does not indicate voice inflections, facial expressions, a witness's demeanor, the demeanor of the trial judge or the conduct of counsel."

Here, we submit, is part of the case to be made for open trials that was ignored in *Gannett*. The briefs supporting open pretrial hearings in that case stressed the importance of the crucial events that often occur at such hearings – the secret deals, the failure to press for prosecution where prosecution is clearly called for, the vindictive or repressive acts of a judge or prosecutor, the failure to defend effectively. But there is more to be observed than the occasional, aberrant act of a system gone wrong.[9] As the Florida judge implied, even the

---

[8]Report to the Supreme Court of Florida re: Conduct of Audio-Visual Trial Coverage (undated), following *Florida* v. *Zamora*, Circuit Court, Eleventh Judicial Circuit of Florida, Criminal Division, Case No. 77-25123-A, at 15-16.

[9]We do not mean to denigrate the importance of public scrutiny because of the possibility of corruption or malice. As one court has noted:

> Because of corruption or malice, a secret judicial proceeding may be and has been used to railroad accused persons charged with crime. Secret proceedings may be used to cover up for incompetent or corrupt police, prosecutors and judges, and the influence of corrupt politicians on the judicial system. [*State ex rel. Dayton Newspapers, Inc.* v. *Phillips*, 46 Ohio St.2d 457, 466-467, 351 N.E.2d 127, 133-134 (1976).]

See also Fenner and Koley, "The Rights of the Press and the Closed Court Criminal Proceeding," 57 Neb. L. Rev. 442, 447 (1978), where the authors ask: "What about the judge, for example, whose

judge or attorney not bent on nefarious deeds can nevertheless so conduct himself or herself that justice is betrayed. And, most importantly, such conduct may never appear in the public record — the sly smile, the wink, the derisive tone, the look of disbelief and other facial expressions. Whether or not intended, these seemingly innocuous mannerisms, particularly if habitual, can have a profound effect on witnesses and jurors.

Still another point was either overlooked or given insufficient attention in *Gannett*. The media, by one method or another, is going to attempt to discover and report what occurred at any closed judicial proceeding. Since a direct prior restraint on the press is impermissible under such circumstances,[10] and since attempts to prevent trial participants from talking, whether or not constitutionally permissible,[11] have often proven ineffective, we can assume that many closed proceedings will be reported in one fashion or another. It is a simple fact of common experience that the media's chances of *accurately* reporting what has occurred are increased by personal observance of the actual events, whereas the same chances are diminished by reports based on what has been picked up from third parties who, either through faulty observance or because of bias, may not be relating events as they actually happened.

---

fear of exposure or personal animosity towards the press leads him to routinely close criminal action proceedings as a means of personal defense?" (footnote deleted).

[10] *Nebraska Press Ass'n* v. *Stuart, supra; Oklahoma Pub. Co.* v. *District Court,* 430 U.S. 308 (1977) (per curiam).

[11] *See In re Halkin,* 598 F.2d 176 (D.C. Cir. 1979); *CBS, Inc.* v. *Young,* 522 F.2d 234, 240 (6th Cir. 1975); *Chicago Council of Lawyers* v. *Bauer,* 522 F.2d 242 (7th Cir. 1975), *cert. denied sub nom. Cunningham* v. *Chicago Council of Lawyers,* 427 U.S. 912 (1976).

Thus, the result of closed courtrooms has far-reaching adverse implications. The more second-hand the reporting, the more likelihood of error; the more likelihood of error, the less informed the public, and the greater the risk that persons even remotely involved will consider themselves damaged by inaccuracies or misrepresentations, with a resulting chilling effect on all reporting — not only of that material which the court was attempting to keep from the public in the first place, but of all facts surrounding the closed proceeding.

And so it is that judicial proceedings must remain open not because of public curiosity, not because the media derive profit from reporting the news, and not merely because our people are entitled to know the key events that transpire when justice is administered. Courts must remain open because that is the only way the totality of judicial proceedings can be observed. With courts open, judges will be more attentive to their business, more courteous, more impartial in word, deed and expression, more circumspect in their language, more sensitive to the needs of minorities and the afflicted. Attorneys on both sides will be more respectful, better prepared, more careful in their representations of fact and law, more courteous, and in all respects better officers of the court. Thus, there will be two juries: the one in the box determining the fate of the accused, and the one in the audience passing judgment on the over-all performance of our court system, making certain that in all respects justice is in fact being carried out.[12]

---

[12] As one judge has put it, "a transcript of a proceeding is a sterile substitute for observing the actual conduct of a hearing, as reviewing courts are well aware. Actual observation of the de-

For each of these reasons — of policy and of law — we respectfully urge the Court not to allow the lower courts to effectuate a basic transformation of the judicial system in this country. Our courts can deal with the possibility of prejudicial publicity, embarrassment to witnesses, jury distractions, threats on persons' lives, and the myriad other reasons proffered for closing courtrooms; they have a multitude of devices and means available for meeting these contingencies short of closing their doors. But the public has no redress once those doors are closed. No second-hand version or delayed transcript will take the place of a first-hand view, or of an accurate, complete and contemporaneous report, of what transpired in court.[13] If the doors close, the people

meanor, voice, and gestures of the participants in a hearing must be as informative to the press and public as those same matters are to juries during trial." *State ex rel. Newspapers, Inc.* v. *Phillips, supra,* 46 Ohio St. at 471, 351 N.E.2d at 136 (Stern, J., concurring). This is part of making certain that "justice must not only be done but must manifestly be seen to be done * * *." Mr. Justice Frankfurter, concurring in *Joint Anti-Fascist Refugee Comm.* v. *McGrath,* 341 U.S. 123, 170-172 (1951), and quoting from *Rex* v. *Justices of Bodmin* [1947] 1 K.B. 321, 325 (1946). Moreover, as noted by Fenner and Koley, *supra,* a cold record presented to newsmen after the event relates to proceedings "which by then are no longer news, but history" (57 Neb. L. Rev. at 454; footnote deleted), or which have become "obsolete or unprofitable." Emerson, *The Doctrine of Prior Restraint,* 20 Law and Contemp. Prob. 648, 657 (1955).

[13]Obtaining a transcript of proceedings after those proceedings are concluded is not a practical solution for other reasons as well. The media in most important cases have to pay to have the court reporter's notes transcribed, which may be burdensome to the reporter, is more expensive the longer the proceeding, and often results in inordinate delay. If a tape recording is available, it usually has gaps or is otherwise in part unintelligible. Thus, there is no effective and practical way of learning what went on in a closed hearing without undue expense and delay, even if the transcript or recording fully revealed what had occurred — which they do not.

will have lost a precious part of their governmental heritage: the right to *witness* justice in action and thus to pass judgment on whether, in fact, it is justice that our courts are dispensing.

CONCLUSION

For all of the above reasons, Amicus Curiae respectfully urge the Court to hold that in the absence of proof of a direct, immediate and irreparable injury to the administration of justice, criminal trials in this country must remain open. We also urge the Court to reexamine the Court's rationale in *Gannett* and to hold that the same criteria apply to the closing of *all* judicial proceedings, whenever and wherever held.

Respectfully submitted,

E. BARRETT PRETTYMAN, JR.
Hogan & Hartson
815 Connecticut Avenue, N.W.
Washington, D.C. 20006

Attorney for Amici Curiae

Of Counsel:

Jack C. Landau
Peter C. Lovenheim
The Reporters Committee
for Freedom of the Press
1125 15th Street, N.W.
Washington, D.C. 20005

Erwin G. Krasnow
1771 N Street, N.W.
Washington, D.C.
The National Association
of Broadcasters

Arthur B. Sackler
Suite 400
1627 K Street, N.W.
Washington, D.C. 20006
The National Newspaper
Association

J. Laurent Scharff
Pierson, Ball & Dowd
1200 18th Street, N.W.
Washington, D.C. 20036
The Radio-Television News
Directors Association
1735 DeSales Street, N.W.
Washington, D.C. 20036

Leon Ely
Suite 118
Wards Building
Richmond, Virginia 23227
The Virginia Press
Association

Other Interested Parties:

Frank Johnson, Managing Editor
(Tucson) Arizona Daily Star

Michael Davies, Editor
Kansas City Star

for

The Associated Press
Managing Editors
50 Rockefeller Plaza
New York, New York 10020

Vivian Vahlberg
The Daily Oklahoman

for

The National Press Club
National Press Building
Washington, D.C. 20045

Robert Lewis
Newhouse News Service

for

The Society of Professional
Journalists, Sigma Delta Chi
35 E. Wacker Drive
Chicago, Illinois 60601